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In the Supreme Court of the United States

OCTOBER TERM, 1984

ELOISE BEARD, ADMINISTRATRIX OF THE ESTATE
OF JEFF BEARD, DECEASED, PETITIONER

v.

WILLIAM M. O'NEAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a government informant, who was present at the scene of a murder, was not the cause of the victim's death and had no constitutional duty to prevent the murder.
2. Whether the court of appeals correctly held that FBI officials who allegedly were negligent in supervising the informant's activities did not cause the victim's death.
3. Whether the court of appeals correctly held that a suit against the United States, alleging a deprivation of life without due process in violation of the Fifth Amendment, is barred by sovereign immunity.



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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1909

ELOISE BEARD, ADMINISTRATRIX OF THE ESTATE
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v.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 728 F.2d 894. The opinion of the district court (Pet. App. 25-31) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1984. The petition for a writ of certiorari was filed on May 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 17, 1972, Stanley Robinson, a City of Chicago police officer, brutally murdered petitioner's decedent, Jeff Beard. Present at the scene of the murder and acting as Robinson's accomplice was William O'Neal, who was actually serving as a paid informant for the FBI in its investigation of Robinson (Pet. App. 2).

O'Neal had been used as an informant by FBI agent Roy Mitchell since 1968 and was regarded by Mitchell as an excellent informant. See *Beard v. Mitchell*, 604 F.2d 485, 489 (7th Cir. 1979).¹ Sometime in 1972, Mitchell contacted O'Neal and asked him to assist in an investigation of several unsolved murders (*ibid.*). O'Neal made contact with Robinson and agreed to participate with him in a proposed million dollar robbery. Robinson was, however, also a contract killer, and prior to May 17, O'Neal accompanied him on several unsuccessful efforts to murder various individuals. O'Neal was present at one actual murder — of someone whom Robinson had mistakenly believed was his target (*id.* at 490-491).

While the FBI was investigating these earlier crimes, O'Neal arranged to accompany Robinson on a "small job" on May 17 (Pet. App. 2). Beginning at 6:00 p.m. Robinson, with O'Neal driving the car, went in search of Jeff Beard with the intent to fulfill a contract to murder him. After a lengthy search, O'Neal persuaded Robinson to give up for the evening, but as they were heading to O'Neal's car, Robinson fortuitously spotted Beard at a pool hall (*id.* at 3). Robinson and O'Neal waited outside the pool hall for 45 minutes. During that time, O'Neal tried to telephone his FBI contact, Mitchell (Pet. App. 3), but Mitchell was not home (*ibid.*). When Beard left the pool hall, Robinson "arrested" him and put handcuffs on him, placed him in the car, and ordered O'Neal to drive to Indiana. After a brief stop to allow Robinson to make a telephone call, Robinson returned and personally drove the car. Robinson told Beard

¹Petitioner filed suit under 42 U.S.C. (& Supp. V) 1983 against Robinson, O'Neal and Mitchell, alleging that they conspired to deprive and actually deprived Beard of his constitutional rights. The suit against Mitchell was tried to a jury, which found him not guilty of violating the deceased's constitutional rights, and that judgment was affirmed on appeal. 604 F.2d 485 (7th Cir. 1979).

that all he wanted Beard to do was sell some narcotics for him. He then stopped the car and asked Beard to get out so they could talk. When Beard got out, Robinson shot him. The wounded Beard ran across the road, and Robinson ran back to the car 604 F.2d at 492. O'Neal told Robinson that he had "messed up" (Pet. App. 3), and Robinson told O'Neal to stay in the car and then followed Beard across the road, where he murdered him (*ibid.*).²

2. Petitioner filed the instant suit in the United States District Court for the Northern District of Illinois as a *Bivens* action directly under the Constitution against the FBI, O'Neal and various employees of the FBI, in both their personal and official capacities.³ She sought damages for the murder of her brother. The district court dismissed the claims against the FBI and its employees in their official capacity on the ground that such suits for damages were barred by sovereign immunity (Pet. App. 34). The court later entered summary judgment in favor of O'Neal and the federal defendants on the ground that the claims were res judicata on the basis of petitioner's unsuccessful suit against FBI agent Mitchell (see note 1, *supra*) (Pet. App. 25-31).

The court of appeals, by a vote of 2-1, affirmed (Pet. App. 1-24). The court of appeals rejected the district court's reliance on res judicata since none of the defendants were in privity with Mitchell. It also declined to rely on collateral

²Based largely on O'Neal's testimony, Robinson was convicted under 18 U.S.C. 241, 242 of violating Beard's civil rights and he was sentenced to life imprisonment (Pet. App. 3); that conviction was affirmed. *United States v. Robinson*, 503 F.2d 208 (7th Cir. 1974), cert. denied, 420 U.S. 949 (1975).

³Petitioner named as defendants Kenneth Grant, who was the supervisor of the agent in charge of the Robinson investigation; Roy K. Moore, who was the special agent in charge of the Chicago office; L. Patrick Gray, who was the Acting Director of the FBI; and the FBI itself.

estoppel as a ground for decision, because the verdict in *Mitchell* failed to specify the basis for that decision (Pet. App. 4-6). The court of appeals nevertheless affirmed because it found under the undisputed facts that O'Neal did not cause the unconstitutional deprivation of Beard's life (*id.* at 6-10). The court reasoned that O'Neal neither directed nor approved Robinson's conduct; indeed, O'Neal made efforts to prevent the murder (*id.* at 7). Further, the court held that O'Neal had no special relationship with Beard and thus no affirmative constitutional duty to do more than he did to prevent the murder (*id.* at 9-10). Finally, the court held that the alleged improper supervision of O'Neal by the FBI officials could not have caused Beard's death, because O'Neal did not cause Beard's death (*id.* at 11).⁴

ARGUMENT

1. a. Petitioner first argues (Pet. 11-12) that the decision of the court of appeals exonerating the government because of the absence of a causal link between the informant's activities and Beard's death is based on an "unspoken * * * belief that there are no limits on how far the F.B.I. and its criminal informant can go in the pursuit of evidence," which allegedly conflicts with decisions of other courts of appeals. This claim severely mischaracterizes the facts and the holding below.

⁴Judge Swygert dissented (Pet. App. 11-24). He agreed that the claims against the FBI and its employees in their official capacity were barred, but he disagreed with the majority that O'Neal as a government informant had no duty to attempt to prevent the murder (*id.* at 15-18). He also found that O'Neal had in some ways "participated" in the murder, which Judge Swygert believed created a jury question on causation. Since, in his view, the claims against O'Neal should not be dismissed, Judge Swygert believed that the personal claims against the federal defendants should survive.

The court of appeals merely concluded that O'Neal's presence was not relevant to Beard's death. O'Neal performed no necessary function for Robinson and O'Neal neither directed nor approved Beard's murder (Pet. App. 7). Indeed, contrary to petitioner's claims, the undisputed evidence showed that O'Neal took some steps — consistent with his need to protect his identity — to save Beard. O'Neal persuaded Robinson to call off the search for Beard (Pet. App. 2-3), and he tried to telephone FBI agent Mitchell to warn him of the danger to Beard (*id.* at 7). O'Neal's good faith in these matters was well documented by his efforts on prior occasions to save the lives of people whom Robinson planned to murder (*ibid.*).

This is therefore hardly a case raising an issue of governmental misuse of an informant. Instead, it involves nothing more than a fact-specific determination of whether an informant's action contributed to the injury claimed by petitioner. The decision of the court of appeals that O'Neal was not the cause in fact of Beard's death does not warrant review by this Court.

b. Nor is this case a proper vehicle for addressing the broad issue of when the government owes a constitutional duty to protect its citizens. Petitioner argues (Pet. 14-17) that the courts of appeals employ varying approaches to this general problem, generally in cases involving jailors or police officers. See, e.g., *Clark v. Taylor*, 710 F.2d 4 (1st Cir. 1983). But not one of the cases cited by petitioner holds that a governmental informant acting undercover on the streets owes a duty to protect citizens.⁵ Petitioner cites

⁵Petitioner inconsistently argues in one place that FBI procedures required informants to prevent crime (Pet. 14 n.4), and in another place that the FBI procedures placed no limits on informants' actions (Pet. 13). The truth lies in between. Special Agent Otto was called by petitioner as an expert witness in *Beard v. Mitchell*, 604 F.2d at 502. He testified regarding the FBI's informal policy of encouraging informants to prevent crimes, to the extent possible consistent with their safety.

no statutory or common law basis for holding a defendant liable in such circumstances. O'Neal had no arrest warrant. He wore no uniform and carried no "badge of authority." *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972). The public was not relying upon O'Neal for its protection. Therefore, under any recognized standard, it is clear that no such duty was present here. See *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983).

2. Petitioner argues (Pet. 13-14) that even if O'Neal is not liable to him, that is no basis for dismissing the claims against the FBI agents based on their violation of an independent duty to supervise O'Neal and on their improper use of O'Neal as an informant and their failure to safeguard Beard's life.⁶ But these claims are dependent ultimately on whether O'Neal was the cause in fact of Beard's death and therefore cannot survive dismissal of the claim against O'Neal.

It is undisputed that the individual federal respondents — Gray, Grant and Moore — were not present at the murder scene. They had no advance warning of the danger

(Pet. App. 77). He explained, however, this was not "an absolute rule" (*ibid.*):

The very nature of informants, you are going to have them placed in the middle of situations which could spontaneously erupt into violent acts. You cannot expect an informant or any other human being, an undercover FBI agent or what have you in some of these circumstances to have prevented acts of violence from having occurred.

⁶Petitioner asserts (Pet. 13) that the FBI officials may be liable for failing to arrest Robinson earlier. But this is a completely discretionary decision and not a proper basis for a tort suit. In *Hoffa v. United States*, 385 U.S. 293, 310 (1966), this Court recognized: "The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long."

to Beard, and they never had immediate contact with O'Neal (Pet. App. 11). The only arguable connection they had with the murder was through O'Neal. The court of appeals correctly held that O'Neal did not proximately cause the deprivation of Beard's life; it follows inexorably that Gray, Grant and Moore, who were even further removed, could not have proximately caused the unconstitutional deprivation of Beard's life. See *Martinez v. California*, 444 U.S. 277, 285 (1980).⁷

3. Finally, petitioner contends (Pet. 17-19) that the United States has no sovereign immunity for constitutional torts. This claim is without merit.

In arguing that the sovereign immunity doctrine is inapplicable to claims founded upon the Constitution, petitioner greatly exaggerates the holding in *Jacobs v. United States*, 290 U.S. 13 (1933). All the Court held there was that the Just Compensation Clause of the Fifth Amendment was an express waiver of sovereign immunity for taking claims against the United States. But this Court has never found that any other constitutional provisions, including the Due Process Clause, constitute a similar "waiver" of sovereign immunity in the sense that they " 'mandat[e] compensation by the Federal Government for the damage sustained.' "

(Respondeat)

⁷In focusing on concepts of **respondant** superior and personal responsibility (Pet. 13-14), petitioner disregards the fact that the court of appeals' decision rested on principles of causation (Pet. App. 11). The decision is entirely consistent with *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), which found that causation in fact was necessary to impose liability on a local government under 42 U.S.C. (& Supp. V) 1983. In *Monell*, the challenged governmental policy directly inflicted the injury on the plaintiff (436 U.S. at 694). Here, it was Robinson, not the FBI's informant policy, that caused the death of Beard. See *Rizzo v. Goode*, 423 U.S. 362, 376-377 (1976) (failure of police supervisors to prevent misconduct by subordinates was not actionable because supervisors played "no affirmative part" in the deprivation of constitutional rights).

See *United States v. Testan*, 424 U.S. 392, 400, 401 (1976) (*Jacobs* is “tied to the language, purpose, and self-executing aspects of that constitutional provision”). Accordingly, sovereign immunity bars an action, such as petitioner’s, which seeks relief under the Due Process Clause drawn from the federal treasury.⁸ Seven months after *Jacobs*, this Court made the point absolutely clear in *Lynch v. United States*, 292 U.S. 571, 582 (1934):

The sovereign’s immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress * * *; and to those arising from some violation of rights conferred upon the citizen by the Constitution * * *.

See *Butz v. Economou*, 438 U.S. 478, 504 (1978).⁹ Therefore, the court of appeals properly affirmed the district court’s dismissal, on sovereign immunity grounds, of claims against the FBI and the individual federal respondents in their official capacities (Pet. App. 4 n.1).

⁸Petitioner does not dispute that her claims against the FBI and against the individual federal respondents in their official capacities would, if successful, require payment from public funds. See generally *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

⁹Petitioner did not predicate her action upon the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, and indeed she concedes (Pet. 19) that such a suit would be barred by the discretionary function exception to the Act. See *Butz v. Economou*, 438 U.S. 478, 505 n.33 (1978). See generally *United States v. Varig Airlines*, No. 82-1349 (June 19, 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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